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"Protecting Consumers' Rights"

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February 20, 2011

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20544

Received & Inspected

MAR -2 2011

FCC Mail Room

Re: Philip J. Charvat v. Echostar Satellite, LLC

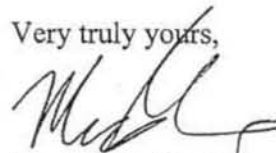
Dear Secretary Dortch,

On December 30, 2010, the Sixth Circuit Court of Appeals, in *Philip J. Charvat v. Echostar Satellite, LLC*, No. 09-4525, recognizing the broad authority and discretion of the Federal Communications Commission to interpret and enforce the Telephone Consumer Protection Act, 47 U.S.C. § 227, and its implementing regulations, 47 C.F.R. § 64.1200(a)(2), "referred" this case to the FCC, pursuant to the "doctrine of primary jurisdiction," for the FCC's review and comment.

In accord with such referral, enclosed please find one (1) original and nine (9) copies of the Petition For An Expedited Clarification Of And Ruling On The Telephone Consumer Protection Act of 1991, Submitted by Philip J. Charvat.

Please call upon me if you have any questions as to this filing.

Very truly yours,



Matthew P. McCue

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MAR -2 2011

FCC Mail Room

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)	
)	
Philip J. Charvat)	
)	
v.)	Docket No. _____
)	
Echostar Satellite, LLC)	

**PETITION FOR AN EXPEDITED CLARIFICATION OF AND RULING ON
THE TELEPHONE CONSUMER PROTECTION ACT OF 1991,**

SUBMITTED BY PHILIP J. CHARVAT

COUNSEL FOR PHILIP J. CHARVAT,

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I. SUMMARY

On December 30, 2010, the Sixth Circuit Court of Appeals, in *Philip J. Charvat v. Echostar Satellite, LLC*, No. 09-4525, recognizing the broad authority and discretion of the Federal Communications Commission (“FCC”) to interpret and enforce the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), and its implementing regulations, 47 C.F.R. § 64.1200(a)(2), “referred this matter” to the FCC pursuant to the “doctrine of primary jurisdiction.” Pursuant to the Order of the Sixth Circuit, the petitioner Philip J. Charvat (“Mr. Charvat”), respectfully petitions the FCC for a declaratory ruling generally consistent with the principles set forth in the FCC’s *Amicus Curiae* brief submitted to the Sixth Circuit Court of Appeals, attached at Exhibit 1. More specifically, Mr. Charvat, requests that the FCC declare and recognize that:

- The FCC has long stated that an entity need not itself have physically transmitted, sent, or directly dialed a “telephone solicitation” or “unsolicited advertisement” in order to be subject to liability for a violation of the TCPA, any sub-section of the TCPA, or of the TCPA’s implementing regulations and interpretive decisions as issued by the FCC. If the “telephone solicitation” or “unsolicited advertisement” is dialed or sent “on behalf of” an entity, that entity is responsible for making sure that such a solicitation is compliant with the TCPA, and is liable if it is not compliant.
- Whether a call is made “on behalf of” an entity should be determined by the plain meaning of such words. A call is made “on behalf of” or “for the benefit of” an entity if it is made in the entity’s interest, by an individual that represents that entity’s interest, or for the entity’s benefit. Most simply stated, the entity on whose behalf a call is made is the entity whose goods or services are the subject of the alleged illegal call.
- If the TCPA’s prohibition against advertising via pre-recorded message, set forth at 47 U.S.C. § 227(b)(1)(B), is interpreted to extend only to the entity that physically dialed an illegal call, and not with the entity “on whose behalf” such a call is made, the TCPA’s strict prohibition against telemarketing via pre-recorded message would be eviscerated. To avoid such a result, generally accepted principles of agency and joint venture law should be applied to ensure that entities who violate the TCPA, via third parties, are appropriately held accountable.
- An entity must not be allowed to escape responsibility for telephone solicitations or advertisements made, in violation of the TCPA, on its behalf or for its benefit, by

claiming that such calls were made without actual knowledge, actual authority, or were made in contravention of self serving contract language agreed to by the defendant entity and the third party who physically dialed the call at issue.

II. BACKGROUND

A. Telephone Solicitations Are Sent to Mr. Charvat By Echostar's Retailers

Mr. Charvat is a resident of Ohio. From June 2004 through August 2007, Mr. Charvat received thirty (30) illegal telemarketing calls from at least five of Echostar Satellite, LLC's ("Echostar") authorized retailers, promoting Echostar's satellite television services (the "Calls"). Twenty-seven (27) of the Calls were initiated by pre-recorded message ("Robocall"), in violation of 47 U.S.C. § 227(b)(1)(B). Many of the Calls failed to properly identify the entity responsible for initiating the Calls, in violation of 47 C.F.R. §64.1200(b)(1)(2). Many of the Calls violated the various Do Not Call provisions set forth at 47 U.S.C. § 227(c) and 47 C.F.R. §64.1200(c). All of the Calls were offers to purchase Echostar's goods or services. Every one of the Calls was made for the ultimate benefit of Echostar. Every one of the Calls was made on Echostar's behalf, even if not physically dialed by Echostar. Every one of the Calls was, in various ways, in violation of the TCPA, 47 U.S.C. §227, *et seq.*, and its corresponding regulations set forth in 47 C.F.R. §64.1200.

Echostar, now known as Dish Network Satellite, LLC ("Dish Network"), a Colorado limited liability company, is the sole provider of Dish Network satellite television programming, and advertises directly to consumers throughout the United States. To sell its products and services, Echostar contracts with several thousand agents it characterizes as "retailers" and authorizes them to market Echostar's services on Echostar's behalf. Echostar provides its retailers with marketing materials and authorizes them to use the Dish Network logo and name when marketing on Echostar's behalf. At all relevant times, Echostar had actual knowledge that

its retailers were engaged in telemarketing in an effort to sell Echostar's goods and services. Furthermore, Echostar directly rewards its retailers by compensating them for each new Dish Network subscriber they generate, and for specified products and services sold on Echostar's behalf. Echostar closely controls its retailers as it (1) determines the type of programming sold on its behalf by its retailers; (2) determines the pricing for such goods and services; (3) retains ownership control over the new customers originated by retailers, and (4) maintains the discretion to discipline or terminate its retailers. That Echostar heavily relies on its retailers to promote its goods and services, and to generate new customers, is without doubt. In its 10Q filing dated May 15, 2009, Echostar admitted that:

"it depend[s] on third parties to solicit orders for DISH Network services that represent a significant percentage of our total gross subscriber acquisitions."

See Dish DBS Corp., Form 10Q at Part I (filed 5/15/09) for period ending 3/31/09).

B. The Charvat Litigation Against Echostar

On October 2, 2007, Mr. Charvat filed suit against Echostar relating to the Calls, and their myriad violations of the TCPA. In response, Echostar claimed the Calls were made by its "retailers," who were "independent contractors" over which it did not exercise control. Echostar similarly stated it had no control over the actual methods of telemarketing used by its retailers, and claimed that its contracts with its retailers forbid its retailers from engaging in any form of illegal conduct.

In its December 15, 2009 Memorandum Opinion and Order, the Trial Court granted

- Echostar’s “retailers” are independent contractors and that Mr. Charvat failed to adduce sufficient evidence from which a reasonable jury could find that Echostar “maintained the kind of control needed for liability to attach under the TCPA.”
- Echostar could not be liable for calls placed to Mr. Charvat for Echostar’s benefit because agreements entered into between Echostar and its retailers specifically disavow any agency relationship and specifically prohibit retailers from using EchoStar’s name in any manner that would imply that the retailers are acting or authorized to act on Echostar’s behalf.”

See Philip Charvat v. Echostar Satellite, LLC, 676 F.Supp. 2d 668 (Dec. 15, 2009). On this basis, the Trial Court dismissed Mr. Charvat’s claims against Echostar.

C. The Charvat Appeal and FCC’s Request For Referral.

Mr. Charvat, subsequently appealed to the Sixth Circuit Court of Appeals. Thereafter, the Attorneys Generals of Ohio, Illinois, Michigan and Tennessee, and the Commonwealth of Kentucky filed a joint *Amici Curiae* brief disagreeing with the Trial Court’s interpretation of the TCPA. The *Amici Curiae* of the Attorneys General is attached at Exhibit 2. On October 15, 2010, the Sixth Circuit invited the FCC to submit a brief setting forth its position on two issues:

1. Whether under 47 U.S.C. § 227(b)(1)(B), and the accompanying regulations, an entity is liable for calls that it did not initiate in light of the FCC’s Memorandum Opinion and Order, *In the Matter of Rules and Regulations Implementing the TCPA of 1991*, 10 fcc Rcd 12391 (1995), 47 U.S.C. § 226(c)(5) and 47 C.F.R. § 64.1200, or otherwise.
2. If the answer to the first question depends on section 227 (c)(5) of the Communications Act of 1934, whether the “on behalf of” clause in that section incorporates principles of agency law.

The *Amici Curiae* brief, submitted by the FCC in response, is attached at Exhibit 1. In its submission, the FCC stated:

In the view of the federal government, an entity can be liable under the TCPA for a call made on its behalf even if the entity did not directly place the call. Under those circumstances, the entity is properly deemed to have initiated the call through another.

FCC Amici Brief at pg. 2.

The FCC further advised that whether a call is made “on behalf of” an entity should not be made based upon state specific principles of agency law that could undermine the regulatory scheme the TCPA was enacted to create. The FCC then requested that the Sixth Circuit “refer” the appeal to the FCC, pursuant to the “doctrine of primary jurisdiction” to allow the FCC to more thoroughly evaluate, and to seek public comment, on the issues that have arisen in this case.

On December 30, 2010, the Sixth Circuit in *Philip J. Charvat v. Echostar Satellite, LLC*, No. 09-4525 (Sixth Cir. 12/30/2010) formally referred “the matter” to the FCC for its review and determination of the key issues on appeal. The referral from the Sixth Circuit seeks guidance from the FCC as to the proper interpretation of the phrase “on behalf of,” and the term “initiate,” in the context of the TCPA, the FCC’s TCPA regulations, and the various Orders issued by the FCC regarding the TCPA and its regulations.

III. ISSUES PRESENTED TO THE FCC FOR REVIEW

A. The TCPA Was Enacted To Protect The Privacy Rights of Consumers And Explicitly Empowered Consumers To Enforce The TCPA Via Private Rights of Action.

On December 20, 1991, Congress enacted the TCPA in an effort to address certain telemarketing practices widely considered invasive of consumer privacy. In enacting the TCPA, Congress specifically imposed heightened restrictions on the widespread practice of telemarketing via Robocall. The TCPA’s specific focus on Robocalls was intentional because Congress recognized that such calls are more intrusive to the privacy concerns of the called party than live solicitations.¹

¹ For example, Chairman Markey noted that: Today in America more than 300,000 solicitors make more than 19 million calls every day, while some 75,000 stockbrokers make 1.5 billion telemarketing calls a year. Automatic dialing machines, on the other hand, have the capacity to call 20 million Americans during the course of a single day, with each individual machine delivering a prerecorded message to 1,000 homes. *See In The Matter of Rules and*

It is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by “live” persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape of a voice recording service, and do not disconnect the line even after the customer hangs up the telephone. For all these reasons, it is legitimate and consistent with the Constitution to impose greater restrictions on automated calls than on calls placed by lived persons.

See In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 2736, 2737, at para. 25 (April 17, 1992). Additionally, in implementing the TCPA, Congress included a specific Congressional Finding stating:

Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

47 U.S.C. § 227, Congressional Statement of Findings Nos. 10 and 122; *see also Moser v. Fed.*

Comm’n’s Comm’n, 46 F.3d 970 (9th Cir. 1995) (describing the TCPA’s legislative history and specifically discussing the rationale behind TCPA’s Robocall prohibition).

Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 F.C.C.R. 17459 at note 91 (2002), quoting 137 Cong. Rec. H10, 341 (Nov. 18, 1991).

2 With respect to telemarketing via auto-dialer, Senator Hollings of South Carolina, the primary sponsor of the TCPA, explained that **“computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall”**. *See In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 F.C.C.R. 17459 at note 90 (2002), quoting 137 Cong. Rec. H10, 341 (Nov. 7, 1991).

In regards to telemarketing via Robocall, The TCPA provides that:

It shall be unlawful for any person within the United States to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is otherwise exempted by the FCC.

47 U.S.C. §227(b)(1)(B) (emphasis added). The TCPA, and its implementing regulations, also require telemarketers soliciting via Robocall to properly identify themselves. *See* 47 U.S.C. §227(b)(1)(B) and 47 C.F.R. §64.1200(b)(1)(2). A consumer may enforce the TCPA's prohibition against telemarketing via Robocall, in violation of 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. §64.1200(b), via the private right of action at 47 U.S.C. § 227 (b)(3). The TCPA, and its implementing regulations, also require telemarketers engaged in all forms of telemarketing to comply with the various time of day and Do Not Call requisites, set forth at 47 U.S.C. § 227(c) and 47 C.F.R. §64.1200(c). A consumer may enforce a violation of these provisions of the TCPA via the private right of action at 47 U.S.C. § 227(c)(5).

B. The Entity On Whose Behalf A Robocall Telephone Solicitation Is Made Is Liable For Ensuring Compliance With The TCPA In Its Entirety

The TCPA's prohibition against advertising via Robocall, as implemented and interpreted by the FCC only extends to calls that constitute an unsolicited advertisement or *telephone solicitation*. *See* 47 C.F.R. § 64.1200(f)(12) and (13) (emphasis added). A telephone solicitation is defined, under the FCC's regulations, as "the initiation of a telephone call or message for the purpose of encouraging the purchase of or rental of, or investment in, property, goods, or services, which is transmitted to any person..." *See* 47 C.F.R. § 64.1200(f)(12). Over the years, the FCC has repeatedly made clear that an entity engaged in illegal telemarketing cannot evade the TCPA, simply by contracting with third parties who, in turn, telemarket on an entity's behalf. In this regard, the FCC has repeatedly warned:

We take this opportunity to reiterate that a company on whose behalf a **telephone solicitation** is made bears the responsibility for **any** violation of our telemarketing rules and calls placed by a third party on behalf of that company **are treated as if the company itself placed the call.**

See In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of State Farm Mutual Automobile Insurance Company for Clarification and Declaratory Ruling, CG Docket No. 02-278, 20 F.C.C.R. 13664 at ¶7 (August 17, 2005) (emphasis added). *See also In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order*, 10 F.C.C.R. 12391 at ¶13 (1995) (“our rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations”); *In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG 02-278, 23 F.C.C.R. 559 at ¶10 (Jan. 4, 2008) (reiterating that “on behalf of” liability extends to all telephone solicitations in violation of the TCPA).³

A Robocall that includes a message for the purpose of encouraging the purchase of goods or services, is a “telephone solicitation” under the TCPA. Accordingly, when the TCPA, its implementing regulations, and the FCC’s long standing interpretation of “on behalf of” liability as it relates to illegal “telephone solicitations” are read together, it is self-evident that an entity on whose behalf a Robocall telephone solicitation is made, is ultimately responsible for ensuring that such a call is compliant with the TCPA. Such calls will be treated by the FCC as if the entity

³ Courts have similarly appropriately recognized that a defendant cannot shield itself from liability under the TCPA simply by hiring a separate entity to market its products and services. *See Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1950); *Brentwood Travel v. Annex Computers, Inc.*, 2001 TCPA Rep. 1046, 2001 WL 36018637 (Mo. Cir. Dec. 18, 2001); *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363 (Ga. App. 2000); *Charvat v. Dispatch Consumer Services, Inc.* 95 Ohio St. 3d 505, 2002 Ohio 2838, 769 N.E.2d 829; *Worsham v. Nationwide Insurance Agency*, 772 A.2d 868 (Md. App. 2001).

itself placed the call. See *In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG 02-278, 23 F.C.C.R. 559 at ¶10 (Jan. 4, 2008) (specifically recognizing “on behalf of” liability in the context of a Robocall sent to a consumer by a third party on another entity’s behalf).

Echostar claims that because “on behalf of” language does not appear in the text of 47 U.S.C. 227 (b)(1)(B), it is not liable for Robocalls sent to Mr. Charvat by its retailers on its behalf and for its benefit, because it did not itself physically “initiate” the Robocalls. In other words, Echostar, and the telemarketing industry, will claim that they cannot be held liable for sending Robocall telephone solicitations to consumers unless they physically dialed the Robocall at issue. Echostar, however, ignores that the Robocalls sent to Mr. Charvat were all “telephone solicitations” seeking to sell Echostar’s goods and services, and further ignores that the FCC has long recognized that it will extend TCPA liability to the entity on whose behalf a “telephone solicitation” is made in violation of the TCPA. Accordingly, if Robocall “telephone solicitations” sent to Mr. Charvat by Echostar’s retailers were made “on behalf of” or “for the benefit of” Echostar, the responsibility for ensuring that such calls were compliant with the TCPA is upon Echostar, even if Echostar did not physically dial the Calls or have physical control over the dialing equipment used to send the Calls to Mr. Charvat.

C. Whether An Illegal Call Is Made “On Behalf Of” An Entity Should Be Determined By The Plain Meaning of the Phrase.

The Trial Court in *Philip Charvat v. Echostar Satellite, LLC*, 676 F.Supp. 2d 668 (Dec. 15, 2009), found that since Echostar did not control the specific manner and means in which its “retailers” were telemarketing, the Calls were not made “on behalf of” Echostar. Specifically, the Trial Court concluded:

“no person under Echostar’s direct control engaged in the conduct that allegedly violated the TCPA. The Retailers truly acted as independent contractors as opposed to agents of Echostar.”

Id. at 677. The Trial Court, accordingly, granted summary judgment to Echostar stating “no reasonable juror could find that Echostar retained the right to control the manner or means by which the Retailers carried out their contractual duties.” *Id.*

The Trial Court’s presumption that Echostar’s liability for the Calls required a specific showing that Echostar directly engaged in the illegal telemarketing at issue, or specifically controlled the manner in which telemarketing was conducted by its retailers, was clear error. Such an interpretation of the TCPA stands in stark contrast to the FCC’s long stated warning that “a company on whose behalf a telephone solicitation is made bears the responsibility for any violation of our telemarketing rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the call.” *See In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of State Farm Mutual Automobile Insurance Company for Clarification and Declaratory Ruling*, CG Docket No. 02-278, 20 F.C.C.R. 13664 at ¶7 (August 17, 2005); *In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order*, 10 F.C.C.R. 12391 at ¶13 (1995); *In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG 02-278, 23 F.C.C.R. 559 ¶10 (Jan. 4, 2008).

The Calls were placed by third-party retailers of Echostar. The Calls were “telephone solicitations.” The Calls were “unsolicited advertisements.” The Calls violated the TCPA. The Calls sought to benefit Echostar by selling Echostar’s goods and services, and to solicit Mr. Charvat

to become an Echostar subscriber and customer. Although the Calls undeniably were initiated for Echostar's benefit, The Trial Court *did not* treat the Calls as if Echostar itself placed the calls.

Whether or not a telephone solicitation is made "on behalf of" or "for the benefit of" a particular entity *does not* require specific proof of agency or control. The ordinary meaning of "on behalf of" is "in the interest of," *Merruam Webster's Collegiate Dictionary* 103 (10th ed. 1999), or "as a representative of," or "for the benefit of." Webster's Third New International Dictionary, 198 (2002). Accordingly, a "telephone solicitation" is made "on behalf of" an entity if it is in the entity's "interest" or in its "aid" or for its "benefit." Most simply stated, a "telephone solicitation" is made "on behalf of" an entity if the entity's goods or services are promoted in, or are the subject of, the "telephone solicitation" at issue.⁴

A telephone solicitation, in violation of 47 U.S.C. § 227(b)(1)(B) (prohibition against Robocall), may be enforced by a consumer, via the private right of action at 47 U.S.C. § 227 (b)(3) , against the entity who benefitted from the telephone solicitation or unsolicited advertisement, or in whose interest the telephone solicitation or unsolicited advertisement was made. Similarly, a telephone solicitation, in violation of 47 U.S.C. § 227(c) (specifying Do Not Call and time of day requirements for telemarketing calls), may be enforced by a consumer, via the private right of action at 47 U.S.C. § 227 (c)(5), against the entity who benefitted from the telephone solicitation, or in whose interest the telephone solicitation was made. Under both private rights of action, the entity who benefits from the telephone solicitation at issue is responsible to ensure compliance with *all* the provisions of the TCPA. To prevail, all a consumer need demonstrate is that the telephone solicitation or unsolicited advertisement at issue was made for the defendant entity's benefit. Although the entity that initiates an illegal call and the entity "on whose behalf" a call is made will

⁴ This is the exact definition the FCC has applied in determining whether an entity is the "sender" of an unsolicited facsimile advertisement in violation of the TCPA.

frequently be agents of each other, proof of agency is *not* a requirement of the TCPA. A consumer need not prove that the entity on whose behalf a telephone solicitation or unsolicited advertisement was made was directly involved in the telemarketing at issue, or controlled the methods and means of such telemarketing, or even that they had knowledge that telemarketing was being conducted on its behalf. If a telephone solicitation or unsolicited advertisement, in violation of any provision of the TCPA, is made on an entity's behalf by a third party, the FCC will treat the telephone solicitation or unsolicited advertisement as if it was made by the entity itself. In this regard, the TCPA "is essentially a strict liability statute." See *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 2009 WL 2496568 at *3 (N.D.Ill. Aug. 12, 2009) (TCPA is a strict liability statute); *Park University Enterprises, Inc. v. American Cas. Co. of Reading, PA*, 314 F. Supp. 2d 1094, 1103 (D. Kan. 2004), *aff'd* 442 F.2d 1239 (10th Cir. 2006) (TCPA is essentially a strict liability statute); *Penzer Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008); *Park Univ. Enters. Inc. v. Am. Cas. Co. of Reading Pa.*, 314 F.Supp.2d 1094, 1103 (D.Kan. 2004); *Accounting Outsourcing, LLC, v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp. 2d 789, 818 (M.D. La. 2004) ("the TCPA ... impose[s] strict liability for [its] civil damages provisions").

D. Alternatively, If The FCC Concludes That "On Behalf Of" Liability Does Not Extend To Pre-Recorded Telephone Solicitations Because Such Language Does Not Appear In 47 U.S.C. 227(b), Agency Law Should Be Applied To Prevent The TCPA's Evisceration.

Echostar, and the telemarketing industry, will claim that "on behalf of" language only appears in the TCPA's private right of action, set forth at 47 U.S.C. § 227(c)(5), relating to Do Not Call requisites set forth at 47 U.S.C. § 227(c) and 47 C.F.R. §64.1200(c). They will then argue that since similar language does not appear in the text of the Robocall prohibition found at 47 U.S.C. 227 § (b)(1)(B), or in its accompanying private right of action found at 47 U.S.C. § 227 (b)(3), that "on behalf of" liability cannot extend to TCPA Robocall violations. Instead, Echostar,

and the telemarketing industry, will claim that TCPA Robocall liability lies solely with the entity that “initiates” or “directly places” a Robocall.

Echostar is wrong. As detailed above, that “on behalf of” language does not appear in the text of 47 U.S.C. § 227(b) is not relevant, as the FCC has long interpreted “on behalf of” liability to extend to *all* telephone solicitations, including telephone solicitations sent via Robocall. *See In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG 02-278, 23 F.C.C.R. 559 at ¶10 (Jan. 4, 2008).

If Echostar’s interpretation of the TCPA’s Robocall prohibition is adopted, the privacy protections afforded consumers by the TCPA would be eviscerated. Entities seeking to promote their goods and services, via third parties who physically dial the calls, will flood consumers with Robocalls. Without doubt, such Robocalls will be delivered to consumers via an array of shady marketing entities, with corporate headquarters at a Mail Box Express, and utilizing phone lines “spoofed” to disguise the true identity of the entity making the call. Consumers who complain will then be summarily dismissed by the entity on whose behalf the Robocall is made, who will claim that as they did not “initiate” or “directly dial” the call, they bear no responsibility for the call. This cannot, and must not be the law. The FCC can most readily avoid such an unacceptable result by simply reiterating what it has long held:

A company on whose behalf a telephone solicitation is made bears the responsibility for any violation of our telemarketing rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the call.

By holding entities, such as Echostar, liable for Robocall telephone solicitations made by third parties on its behalf, the FCC can most readily protect the privacy rights of consumers that the TCPA was enacted to safeguard. If, however, “on behalf of” liability is somehow not

deemed to extend to Robocalls in violation of 47 U.S.C. § 227(b)(1)(B) , as enforced via 47 U.S.C. § 227 (b)(3), the FCC should apply generally recognized principles of agency, and joint venture law, to enforce the TCPA and to protect consumers from intrusive telemarketing practices.

For example, the doctrine of respondeat superior generally recognizes that a principal's liability for a tort committed by an agent is secondary or vicarious, and once vicarious liability for negligence is established, the principal becomes strictly liable for damages attributable to the conduct of the person from whom negligence is imputed to the principal. *See 2A Corpus Juris Secundum, Agency*, § 426 (2010). Such liability of the principal arises if the actions of the agent are committed while acting in the scope of the agency relationship. *Id.* at § 425. A principal will also be deemed responsible for the actions of its agent, if the principal has made it apparent to a third party that the agent was authorized to act on the principal's behalf. *Id.* at § 419. A principal who negligently hires or fails to supervise an agent may similarly be liable for the agent's misconduct. *Id.* at § 423. Finally, a principal will be deemed to have "ratified" an act of its agent, if it accepts the benefits of an agent's actions, even though such actions may not have been previously authorized. *See 2A Corpus Juris Secundum, Agency*, § 84 (2010). Similarly, under generally accepted and recognized principles of law entities engaged in a Joint Venture will generally be liable for the acts of one another who are engaged in the common enterprise. *See 48A Corpus Juris Secundum, Joint Ventures, Liability to Third Persons*, § 57 (2010).

There is no doubt that Echostar's retailers had actual authority to market Echostar's goods and services on its behalf. As Echostar's retailers were authorized to market on its behalf, Echostar is liable for the misconduct of its retailers arising from their efforts to market Echostar's goods and services. Echostar also led consumers to believe that Echostar's retailers had apparent authority to market on its behalf as Echostar explicitly authorized its retailers to market on behalf of, and in the

name of, Dish Network. Finally, it is alleged that Echostar was well aware that its retailers were telemarketing on its behalf via Robocall, but allowed such conduct to continue and reaped the benefits of such conduct. Accordingly, Echostar may be liable for its retailer's violation of the TCPA as (1) it failed to properly supervise its retailers, and/or (2) it ratified the actions of its retailers by accepting the benefits of illegal telemarketing. Alternatively, the contractual relationship between Echostar and its "retailers" is a classic joint venture, pursuant to which Echostar may be liable for harm caused to third parties arising from a common enterprise.

Under these circumstances, applying general concepts of agency and joint venture law, and applying those concepts in a fashion that effectuates and does not defeat the TCPA's intent, Echostar, and similarly situated entities that seek to benefit from illegal telemarketing physically conducted by third parties, can be held accountable under the TCPA.⁵

E. Entities On Whose Behalf Telephone Solicitations Are Made Cannot Escape Responsibility By Claiming Lack of Authority, Lack of Actual Knowledge Of The Telemarketing Method Being Used, Or By Pointing To Self Serving Contract Language Requiring Legal Compliance.

There will be no end to the creative arguments that sophisticated and well financed defendants will make in an effort to circumvent the TCPA. Echostar, and other entities with similar business models who regularly engage in telemarketing, via third parties, will argue that they cannot be held responsible for telephone solicitations or unsolicited advertisements initiated on their behalf

⁵ Also in the alternative, the FCC may extend liability for a Robocall violation of the TCPA to the entity who ultimately benefits from the call by applying a broad interpretation of the word "initiate" as it appears in 47 U.S.C. 227 (b)(1)(B). The definition of "initiate" is "to cause or facilitate the beginning of; set going." *Merriam-Webster Dictionary*, www.merriam-webster.com (last visited on February 18, 2011). By authorizing its retailers to telemarket on its behalf, and by compensating its retailers for finding new Dish subscribers, Echostar facilitated or set into motion, the facts that ultimately led to the illegal Robocall telemarketing campaign at issue. Echostar, and the telemarketing industry, will argue that "initiates" means "directly place" and will claim that only the entity that physically dials an illegal call in violation of the TCPA is responsible for such a violation. Such a limited definition fails to effectuate the TCPA's intent to protect consumers from intrusive and abusive telemarketing practices and should be rejected.

where, for example, they did not “authorize” its retailers, dealers, distributors, resellers, authorized agents, lead generators, or any such ilk to telemarket on their behalf, or that they were not aware that certain types of telemarketing, for example, telemarketing via Robocall, were being used to sell their goods or services. Such factors are irrelevant to TCPA liability. If a telephone solicitation, via Robocall or other prohibited means, is made on behalf of an entity, that entity is responsible for ensuring the call is TCPA compliant, just as if that entity had physically dialed the call. It should be noted that claims such as lack of authority, and lack of knowledge that a particular form of telemarketing was being used, may be considered as to damages, when determining whether the TCPA violation at issue was a negligent or a willful act.⁶ These arguments, however, are irrelevant as to liability.

Similarly, Echostar and other entities who telemarket via third parties, will often point to boiler plate “retailer agreements,” or similar contracts, and refer to specific contractual language that prohibits the third-party from engaging in any type of marketing on an entity’s behalf in violation of the law. The defendant entity will plead a version of “plausible deniability” and claim that a telephone solicitation could not have possibly been made on its behalf when it explicitly prohibited such a call from being made in the first instance. Similar to arguments relating to authority and actual knowledge of illegal telemarketing, the FCC should explicitly acknowledge that such creative attempts to escape TCPA liability via self serving contractual provisions will similarly fail. Such contracts may invoke indemnity or contribution rights, and they may have some bearing as to whether a TCPA violation was negligent or willful, but they have no bearing whatsoever on the legal claims of a consumer against an entity on whose behalf a telephone solicitation or unsolicited advertisement is initiated in violation of the TCPA.

⁶ The TCPA’s private right of actions provide for statutory damages of \$500 for a negligent violation and up to \$1,500 for each willful or knowing violation of the TCPA, subject to the discretion of the court. *See* 47 U.S.C. § 227 (b)(3) and 47 U.S.C. § 227(c)(5)

IV. CONCLUSION

The Sixth Circuit Court has inquired “whether under 47 U.S.C. § 227(b)(1)(B), and the accompanying regulations, an entity is liable for calls that it did not initiate...” The answer to this question is YES. A violation of 47 U.S.C. § 227(b)(1)(B) may be enforced by a consumer, via the private right of action found at 47 U.S.C. § 227 (b)(3), even against an entity that did not itself physically dial the call, so long as the Robocall at issue was a “telephone solicitation” made by a third party on the entity’s behalf.

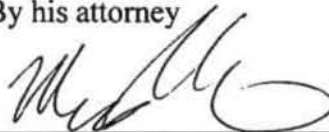
The Sixth Circuit has also inquired whether the determination of “on behalf of” liability requires the application of agency law principles. The answer to this question is NO. Whether or not a telephone solicitation is made “on behalf of” a particular entity *does not* require specific proof of agency or control. The ordinary meaning of “on behalf of” means “in the interest of,” “as a representative of,” or “for the benefit of.” Accordingly, a “telephone solicitation” is made “on behalf of” an entity if it is in the organization’s “interest” or in its “aid” or for its “benefit. Most simply stated, a “telephone solicitation” is made “on behalf of” an entity if the entity’s goods or services are promoted in, or are the subject of, the “telephone solicitation” at issue.

In the alternative, however, if the FCC were to conclude that the meaning of “on behalf of” liability does not turn on the plain meaning of these words, then common law principles of agency and joint venture law, should be recognized to determine whether “on behalf of” liability should apply so that an entity, such as Echostar, is not allowed to reap the benefits of illegal telemarketing conducted by its retailers simply by claiming that it did not press the dial button on the Robocall at issue or by claiming it had no actual knowledge that Robocall telemarketing was, in fact, taking place.

In sum, the Calls sent to Mr. Charvat by Echostar's retailers, sought to sell Echostar's goods and services. As such, the Calls are "telephone solicitations" as that term is defined by the TCPA. The Calls promoted Echostar's goods and services, and accordingly, were made on Echostar's behalf. The TCPA, as interpreted and enforced by the FCC, mandates that any telephone solicitations placed by a third party on behalf of a company, in violation of any provision of the TCPA, are treated as if the company itself placed the call. Accordingly, if the Calls made to Mr. Charvat's home were in violation of the TCPA, Echostar is liable just as if it had dialed the Calls itself.

RESPECTFULLY SUBMITTED,
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By his attorney



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CERTIFICATE OF SERVICE

I, Matthew P. McCue, does certify that on February 20, 2011, I caused a copy of the Petition for An Expedited Clarification of and Ruling on the Telephone Consumer Protection Act of 1991, as Submitted to the Federal Communications Commission by Philip J. Charvat, to be served by electronic mail to Eric Larson Zalud, Esq., Benesch, Friedlander, Coplan & Aronoff, LLP, (ezalud@beneschlaw.com) and Benjamin E. Kern, Esq. Law Office of Benjamin Kern, LLC (bkern@kerniplaw.com).

Matthew P. McCue

Tab 1

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES AS AMICI CURIAE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-4525

PHILIP J. CHARVAT,

Appellant,

v.

ECHOSTAR SATELLITE, LLC,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

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